Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,

Petitioner,

v.

CITY OF ALEXANDRIA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

DAVID ROSS ROSENFELD
118 South Royal Street
P.O. Box 96
Alexandria, Virginia 22313
(703) 548-2600
Attorney for Petitioner.

September 18, 1975

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,

Petitioner,

v.

CITY OF ALEXANDRIA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Pursuant to Rule 24, Rules of the Supreme Court of the United States, as amended, and because petitioner believes that respondent's Statement of the Case misstates certain facts, and further, in light of new and critical facts which have been discovered, petitioner has determined that the filing of this Reply is essential.

In its Statement of the Case, respondent, adopting the language of the trial court, characterizes itself as "title holder." (Resp. Brief, p. 2) The use of this phrase, especially in light of the trial court's refusal to permit petitioner to raise any question regarding respondent's title, is misleading and assumes the truth of the very fact which should have been in issue below, and which forms the focal point of petitioner's constitutional claim.

As evidenced by the record (Pet. App. 4a), the United States Department of the Interior, by letter dated May 17, 1973, has asserted paramount title to the land in question and the federal government's claim of absolute right to evict without "prior notice." On one hand, respondent suggests that, as held by the trial court, such evidence would be irrelevant and "not open to constitutional objection." (Resp. Brief, p. 6) Yet, as argued by petitioner, and as pointed out by respondent, threat of paramount title would, under some circumstances, constitute sufficient grounds to justify and even require an examination of the landlord's title as a matter of public policy. It is, therefore, certainly not inappropriate for petitioner to argue that when the federal government claims paramount title and the right to evict at will, the refusal of the trial court to permit the introduction of such evidence can certainly result in a denial of due process of law.

Respondent further and incorrectly represents that petitioner paid rent through December, 1971, that petitioner, "[s]uddenly in January, 1972" stopped paying rent, and that the parties had entered into good faith negotiations for new lease terms which failed. In its final Order, the trial court, however, clearly held that there were no negotiations after June, 1968, and that petitioner paid rent only through November, 1971. (Pet.

App. 8a-9a) Furthermore, contrary to respondent's suggestion at page 2 of their Statement of the Case, rent was paid under the lease only through March, 1969. It is also a matter of record that respondent had more than ample notice of petitioner's protest and question regarding respondent's title to the land and its authority as landlord. In fact, the last two rent checks tendered by petitioner to respondent clearly indicated that payment was being made under protest. Had exploration of these matters been permitted below, the trial court could have found that such protest constituted "legal notice that [petitioner] was disclaiming the City's title" (Resp. Brief, p. 5, fn. 1) and that evidence disputing the landlord's title would be permissible. However, by foreclosing this avenue of proof, petitioner was deprived of the opportunity to establish the foundation for a completely appropriate contest of the landlord's title. This is the denial of due process of law which forms the basis for this Petition.

The Canons of Judicial Conduct for the State of Virginia specifically require that a judge

> "should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by his kinship, rank, position or influence of any party or other person." Canon 3(c)(1)

The rule recognizes the right of every litigant to have his case tried before an impartial judge and the constitutionally based due process requirement of a hearing before an impartial and disinterested tribunal. However, the rule also requires, as a concomitant of due process of law, the appearance of complete impartiality and a guarantee of the cold neutrality of an impartial judge.

Prior to initiation of the "rent" action below, respondent, the City of Alexandria, was named as a party defendant in litigation instituted to try title to all waterfront property. (Resp. Brief 3, fn. 1) Being named a party defendant, respondent retained the services of a local and prominent law firm to represent its interests. Those interests were clearly in opposition to the United States, since respondent also claimed title to the property in question, and likewise, inconsistent with those of petitioner who seeks to defeat respondent's title in the face of the paramount title of the United States.

In January, 1974, respondent, through its "City Attorney," initiated its "rent" action by filing a complaint in the Circuit Court for the City of Alexandria. However, prior to this filing, the pleadings were submitted for review and comment to the local and prominent law firm representing respondent's interests in the federal title litigation. On February 8, 1974, a partner of this same law firm was appointed to the Circuit Court bench, and on June 21, 1974, entered an Order awarding respondent judgment in this case. At no time during the course of the litigation below was petitioner ever made aware of the trial judge's former association with the law firm representing respondent's interests in similar litigation, nor did the trial judge ever advise counsel for petitioner of the interest and activity of his law firm in the instant case. See affidavit of Kathryn B. Lang and John Gager, attached.

Even a casual review of the facts as they now come to light, suggests a degree of relationship between the respondent and the trial judge sufficient to compel reconsideration of the entire matter prior to entry of any final Order in this case.

CONCLUSION

For these reasons, and those set forth in the original petition, a Writ of Certiorari should issue and the decision of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

DAVID ROSS ROSENFELD
118 South Royal Street
Post Office Box 96
Alexandria, Virginia 22313
(703) 548-2600
Attorney for Petitioner.

ADDENDUM

AFFIDAVIT

I, Kathryn B. Lang, being duly sworn, say and depose that on or about June 5, 1975, in company with John Gager, did go to the office of David Ross Rosenfeld, Esq. in connection with reviewing papers regarding this Petition for Writ of Certiorari, and was shown papers on the letterhead of substantially as I recall, the Law firm of Thomas, Kent, Haddock and Sewell, the subject of which was a draft of pleadings and other things directly related to the instant suit.

As a result of the above, I prepared the attached memorandum, which is to be read as and made a part of this affidavit, and on the morning of June 6, 1975 gave the memorandum to my attorney Robert J. Skahan who took it into the judge's chambers immediately before trial in another matter scheduled before Judge Kent, and this resulted in that case being transferred and heard that day before Judge Wright.

/s/ Kathryn B. Lang

Kathryn B. Lang

COMMONWEALTH OF VIRGINIA

CITY OF ALEXANDRIA, To-wit:

Subscribed and sworn to before me, a Notary Public in for the City and State aforesaid, this 11th day of September, 1975.

/s/ Kathy S. Almquist

Notary Public

My commission expires: 2-14-78

[SEAL]

MEMORANDUM ATTACHED TO AFFIDAVIT OF KATHRYN B. LANG

836-1054

my Client insists that for the record you be asked to *Recuse* in this case. As it is, this case is already fraught with enough conflict of interest.

This Plaintiff has been a party in interest in at least three other cases in which you have, in her opinion, acted unjustly and/or without cause ruled adversely to her interest. She has recently learned that HADDOCK, SEWELL AND KENT actually prepared the whole case in Law 2449 against Old Town Yacht Basin, Inc. and received pay or hire therefor, and that you must have known this at the time you rejected Old Town Yacht Basin's suggestion made through Herman Lutz, Esq. that you recuse in that case but for lesser and more widely known reasons . . . which case Old Town Yacht Basin, Inc. is now appealing to the Supreme Court of the United States.

Note: Equity 11841
Law #2915

AFFIDAVIT

COMES NOW John Gager, who, having first been duly sworn under oath, deposes and says that during the course of preparation of the Petition for Writ of Certiorari in this case, and while at the offices of David Ross Rosenfeld, counsel for petitioner, he personally read certain documents directly related to the respondent's suit for rent, which documents bore the letterhead of the law firm referred to in the attached reply brief.

/s/ John Gager

John Gager

COMMONWEALTH OF VIRGINIA

CITY OF ALEXANDRIA, To-wit:

Subscribed and sworn to before me, a Notary Public in and for the City and State aforesaid, this 11th day of September, 1975.

/s/ Donald C. Wells, Jr.

Notary Public

My commission expires:
March 25, 1978.

[SEAL]